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IN THE

Supreme Court of the United States

October Term, 1964.

No. 419

BEN LAPENSOHN,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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No.

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COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in the above entitled case on May 27, 1964.

CITATION TO OPINIONS BELOW.

The Order of the Supreme Court of Pennsylvania denying Allocatur (Appendix A,[1] Page 1a) has not been officially reported. The Opinion of the Superior Court of Pennsylvania (Appendix C, Page 3a) and the Dissenting Opinion in the Superior Court of Pennsylvania (Appendix D, Page 37a) were reported in — Pa. Super. —, 199 A. 2d 139, 159 (1964). The opinion of the trial judge (printed as part of the Supplemental Record filed in the Supreme Court of Pennsylvania, nine copies of which are being filed herewith), has not been officially reported.

1. Five of the six defendants in this case are filing petitions for writs of certiorari. The opinions and orders of the courts below have been printed as a separate joint appendix to these petitions.

JURISDICTION.

The Order of the Supreme Court of Pennsylvania denying Allocatur (Appendix A, Page 1a), was entered on May 27, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PA. STAT. ANN. tit. 18, § 4302:

"Conspiracy to Do Unlawful Act.

"Any two or more persons who falsely and maliciously conspire and agree to cheat and defraud any person of his moneys, goods, chattels, or other property . . . are guilty of conspiracy, a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment, by separate or solitary confinement at labor or by simple imprisonment, not exceeding two (2) years, or both."

QUESTIONS PRESENTED.

1. Where petitioner was indicted without a preliminary hearing, as normally required under Pennsylvania law, and without any compelling or emergency reasons for dispensing with the hearing, was petitioner deprived of due process and equal protection of the law guaranteed by the 14th Amendment?

2. Where, in a lengthy trial, the judge became an advocate for the prosecution, frequently criticized and ridiculed defense counsel and their objections, cross-examined witnesses, suggested to the jury inferences not based on facts in evidence, made unfair comments on evidence and rendered an argumentative charge, was petitioner deprived of a fair trial guaranteed by the Constitution?

3. Where, after a lengthy trial, the trial court refused petitioner a reasonable time to prepare post-trial motions, and where the trial judge refused to admit appellant to bail after conviction, thus forcing an immediate appeal, and where the appellate court refused a continuance even for a reasonable time so that counsel had to prepare briefs before the record was printed and even before the trial judge filed an opinion, was petitioner deprived of the effective assistance of counsel, as guaranteed by the Constitution?

4. Where petitioner was convicted of a crime for which the Statute of Limitations had run, was he deprived of due process and equal protection of the law guaranteed by the 14th Amendment?

5. Where six Union officials or employees, charged with conspiring to cheat the Union (a misdemeanor), were tried jointly but the trial court allowed all of them only a

total of six peremptory challenges, the same number to which any one would have been entitled if tried separately, and voir dire of prospective jurors was unduly restricted, was petitioner deprived of his constitutional right to the selection of a fair jury?

6. Where there was no evidence of petitioner's guilt of the crime with which he was charged, does his conviction constitute a deprivation of due process of law guaranteed by the 14th Amendment?

STATEMENT OF THE CASE.

Petitioner, an insurance broker and former employee of Local 107 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, was indicted along with six officials of that Union, and all were charged with conspiring to cheat and defraud the Union and its members of their moneys, goods, chattels and other property. After a lengthy trial they were convicted and sentenced to various terms of imprisonment. The convictions were affirmed by the Superior Court of Pennsylvania, with one judge dissenting. The Supreme Court of Pennsylvania refused to review the decision of the Superior Court, despite many troublesome problems of constitutional law and criminal procedure raised in the appeal.

Summary of Proceedings.

In order to understand the petitioner's allegations that he was deprived of substantial constitutional rights by the action of the Commonwealth and of the courts below, it is necessary to describe the incidents leading to his indictment without a preliminary hearing and to follow the proceedings through his trial, post-trial motions and appellate proceedings.

Pre-Indictment: The 1958 investigation of labor activities in the Philadelphia area by the United States Senate Committee led to much publicity in the local papers criticizing leadership of Local 107 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. In January 1959 some of the records of the committee were turned over to the District Attorney of Philadelphia. In September 1959, the District Attorney filed a petition seeking the convening of a Special Grand Jury, which petition was granted by Honorable Joseph E. Gold on September 3, 1959. A petition for Writ of Prohibition was filed on behalf of some of the officers of the Union in the Supreme Court of Pennsylvania and was granted by that Court, speaking through Justice Curtis Bok, with Justices Bell and B. R. Jones dissenting. The Court concluded there was no emergency or danger to the public justifying such an extraordinary remedy.

After the petition for Writ of Prohibition had been filed, but before the Supreme Court acted, on September 15, 1959, Honorable Victor H. Blanc, then District Attorney of Philadelphia, petitioned the Court of Quarter Sessions of Philadelphia County for leave to present a bill of indictment to the Grand Jury without a preliminary hearing (R. 6a-102a) [2] as normally required under Pennsylvania law. Based on the ex parte petition of the District Attorney, leave was granted on September 16, 1959, by Honorable Vincent A. Carroll (R. 10a), sitting in the Quarter Sessions Court, and testimony was presented to the Grand Jury for two days. That Grand Jury found a true bill charging the seven defendants with conspiring from June 10, 1954, continuing to September 19, 1957, to cheat and

2. References prefixed by an "R" and suffixed by an "a" are to the 12 volume record printed for filing in the Superior Court, nine copies of which are being filed with this petition. The opinion of the trial court was printed as a Supplemental Record for filing in the Superior Court, and nine copies are also being filed herewith. References thereto are designated "Supplemental Record" and are suffixed by a "b".

defraud the Union and its members. (One of these defendants, Joseph Grace, later died, and the action as to him was abated April 1, 1963, after the trial had commenced (R. 3a).) In that indictment, the Grand Jury specifically presented that petitioner Lapensohn "from May 9, 1957 and continuously thereafter until July 3, 1958 was not an usual resident or inhabitant of the Commonwealth" (R. 12a).

A Petition for Habeas Corpus was filed on behalf of petitioner Lapensohn on September 23, 1959 (R. 27a). (A similar petition was filed by the other defendants on the same day (R. 30a).) Testimony relating to the alleged necessity of the District Attorney to proceed in this unusual fashion was taken on a number of days over the next several months before Honorable Joseph Gold who thereafter received the briefs, heard the arguments and then denied the petition. He concluded that the District Attorney properly feared the statute of limitations might run if there were a preliminary hearing; although the situation may have been caused by the inaction of the District Attorney for nine months during which he had the information, he had acted in good faith. No reference was made in this opinion to the fact that petitioner Lapensohn had been out of the jurisdiction for 14 months. (Judge Gold's opinion, dated August 22, 1960 is not part of the record in this case, and has not been reported officially.) A timely appeal was filed in the Superior Court of Pennsylvania on behalf of all defendants, but was withdrawn July 10, 1961 (R. 29a) after that Court decided the case of *Commonwealth ex rel. Nichols v. Lederer*, 193 Pa. Super. 482, 165 A. 2d 711 (1960), *aff'd*, 404 Pa. 218, 172 A. 2d 319 (1961), which held that the dismissal of a petition for writ of habeas corpus is an interlocutory decision.

Petitioner then raised the same issue on September 25, 1961 by a Motion to Quash the Indictment (R. 1a, 19a). The other defendants filed a similar motion (R. 22a). By stipulation, it was agreed that the Court would rule upon

the motion based solely upon the notes of testimony of the hearings held before Judge Gold (R. 25a). After argument and consideration of briefs, the Court en banc, consisting of Honorable Joseph Sloane, Honorable Gerald A. Gleason, and Honorable Francis X McClanaghan, on April 11, 1962 denied the Motion to Quash the Indictment (R. 1a, 1153a). On May 31, 1962, after reargument and further consideration, the same Court en banc again so ruled (R. 1a, 1154a). This Motion was renewed at the commencement of the trial and was again denied by the trial judge (R. 188a-1189a).

The trial commenced March 25, 1963 before Honorable David L. Ullman and a jury. On May 27, 1963 after presenting testimony lasting ten weeks and one day and offering almost 1100 exhibits, the Commonwealth rested its case. Motions on behalf of petitioner and the other defendants were denied, and the defendants rested. After closing speeches by counsel, on June 3, 1963 the trial judge instructed the jury which retired at 10:20 o'clock P. M. At 11:40 o'clock P. M., one hour and ten minutes later, the jury returned with a verdict of guilty as to all defendants.

Post-Trial and Appellate: A chronology of the post-trial proceedings must be set out in detail to demonstrate the inordinate and unusual haste with which this petitioner and the other defendants were compelled to perfect their post-trial proceedings.

After the verdict of guilty, the trial judge instructed the defendants to file their motions for new trial and arrest of judgment in four days (R. 4534a) and their supplemental reasons within an additional eleven days (R. 4535a). Petitioner Lapensohn filed his motions on June 6, 1963 (R. 4662a), and thirty-six additional reasons on June 17 (R. 4667a-4694a). The trial judge also required briefs to be filed by July 3, and scheduled argument for July 10 (R. 4535a). Petitioner Lapensohn's counsel thus had only a short time to review over 4500 typewritten pages of notes of testimony, and finally submitted a brief of thirty-four

typewritten pages by July 3. The case was argued on July 10, and five days later the trial court denied all the motions, sentencing petitioner to a term of imprisonment for not less than ten months nor more than two years in the State Correctional Institution at Philadelphia (R. 4756a). (All of the other defendants were also sentenced to imprisonment in the State Correctional Institution, one of the defendants receiving a sentence of not less than one nor more than two years with a fine of $500.00, one receiving a sentence of eight to twenty-three months, one receiving six to twenty-three months, and two receiving terms of three to twenty-three months (R. 4755a-4756a).) At the same time, the trial court refused to admit the defendants to bail pending their appeals.

Thus, in order to obtain the release of petitioner on bail, instead of taking the 45 days permitted by law to file an appeal,[3] counsel for petitioner had to perfect an appeal to the Superior Court on the same day as the sentence was imposed. At the same time he petitioned the Superior Court for bail pending the appeal and for a special supersedeas, which petition was granted by the Honorable Gerald F. Flood, Judge of the Superior Court, who set bail for Lapensohn in the amount of $4,500.00.

As a result of this unusual proceeding, the brief of petitioner Lapensohn became due, under Rule 47 of the Superior Court, at least fifteen days before the commencement of the fall term, which was September 9, 1963. On July 19, 1963, petitioner and the other defendants filed a petition in the Superior Court requesting a continuance of the case to the December list (see Appendix E, page 41a), assigning as reasons therefor the fact that the three largest legal printers in the Philadelphia area had informed them that it would be impossible to print the record in less than eight to sixteen weeks; that counsel had

3. The Pennsylvania Statute states: "No appeal shall be allowed, in any case, from a sentence or order of any court of quarter sessions or oyer and terminer, unless taken within forty-five days from the entry of the sentence or order." PA. STAT. ANN. tit. 12 § 1236.

been continuously engaged in the preparation and trial of the case and preparation and argument of post-trial motions, almost full time, from February, 1963 until this date; furthermore, counsel for petitioner Lapensohn was scheduled to commence a lengthy trial in the United States District Court for the Eastern District of Pennsylvania, which had been specially set for September 9, 1963, and which would require some preparation. This petition for continuance was denied by the Superior Court on July 20, 1963, *which ordered that the case be argued on the original record (only one typewritten copy of which was available to counsel for all the defendants), with the printed record to be filed as promptly as possible after argument, which was set for the first day of the fall term, September 9, 1963.*

On August 13, 1963, petitioner again joined in a second petition to the Superior Court (see Appendix F, page 50a) requesting that the matter be continued to the December, 1963 list. In addition to repeating the reasons contained in the earlier petition, the *petition further alleged that the trial judge had not yet filed his opinion,* despite Rule 46 of the Superior Court which requires the trial judge to file his opinion "forthwith" after service of notice of the appeal, *and the stenographer had not yet filed the notes of testimony,* as required by that Rule. Furthermore, counsel alleged that he had requested a continuance of his specially listed federal case and had been refused, so that he was scheduled to be in both the Superior Court of Pennsylvania and the United States District Court on the same day at the same time. Nonetheless the petition was again refused by the Superior Court.[4]

On August 26, 1963, counsel for petitioner Lapensohn filed in the Superior Court a seventy-one page brief. At that time the trial judge had not yet filed his opinion. On

4. After the Superior Court refused the continuance, the United States District Judge relented and granted counsel a continuance for one day, so that counsel for Lapensohn on September 10, 1963 commenced a trial in the United States District Court which lasted the following five weeks.

September 3, 1963 the trial judge finally filed an opinion which was one hundred and fifteen typewritten pages long (Supplemental Record, 1b-109b). The Commonwealth did not file its briefs until September 6, 1963, even though Rule 47 requires appellee to file five days before the first day of the session. On September 9, 1963 the case was argued before the Superior Court for a full day.

The actual printing of the record was not completed for several months, and the last volume was not filed until December 31, 1963. The Superior Court finally entered its decision affirming the convictions of March 19, 1964. All of the issues raised in this petition, among others, were raised in the Superior Court, as they had been in the trial court. The Superior Court reaffirmed Judge Gold's opinion that the District Attorney had acted in good faith in seeking indictment without a preliminary hearing and that no harm had resulted to appellants; however, *the Court made no reference to the fact that there was no emergency as to petitioner Lapensohn.* The Court also summarized the evidence (in many instances incorrectly) and concluded that it was sufficient to sustain the convictions of all defendants. In determining that the Statute of Limitations had not run, the Court completely misinterpreted several vital facts and drew inferences not justified by the facts. As to the limitation of the right of peremptory challenges, the Superior Court simply concluded that legislature had a right to impose limitations; it did not determine whether the trial court in refusing some extra challenges and in limiting voir dire denied petitioner of an opportunity to select a fair jury. As to the conduct of the trial by the trial judge, the Court simply stated that the trial judge had retained his composure exceptionally well in a long, drawn out, hard fought trial. Judge Watkins dissented on the ground that the last overt act in the alleged conspiracy was the delivery of the checks to the named co-conspirators, not the cashing of those checks, and that there had been

no evidence, only conjecture, as to when or by whom they had been cashed.

Petitioner Lapensohn filed in the Superior Court a petition requesting a reargument, noting that there were several issues overlooked or misapprehended by the Court. This petition was denied April 13, 1964. A timely petition for allowance of appeal was filed in the Supreme Court of Pennsylvania raising the constitutional issues here presented, but, on May 27, 1964 the Supreme Court denied the petition for allowance of appeal. Thus, the case was never argued on the merits before the highest appellate court of this Commonwealth.

Summary of Testimony.

Since it is here argued, as it was in the lower courts, that petitioner was convicted without any evidence of his guilt, it is necessary to summarize the testimony offered during this ten-week trial. The evidence, even interpreted most favorably to the Commonwealth, tended to show the following.

During the period involved in the indictment, defendant Cohen was the secretary-treasurer of the Union; defendant Grace was the president; Hartsough was bookkeeper; Walker was recording secretary; Berman was business agent, and Elco was a union organizer. *Petitioner Lapensohn was not employed by the Union until the week ending July 2, 1954* (it was stipulated that he received his first pay check by that date, R. 4031), *even though the indictment charged formation of the conspiracy on or about June 10, 1954.* His function was that of public relations adviser to the Union. Furthermore, Mrs. Battisfore testified that Lapensohn left the Union prior to November, 1956, just before she was fired (R. 3541a-3543a); it was stipulated that he received his last pay check November 1, 1956 (R. 4013a). *Thus, Lapensohn's connection with the Union ended by November 1956, even though the indictment*

charges that the conspiracy continued until September 19, 1957. However, the testimony can be classified into twenty separate incidents, dealing with four separate categories: the first category relates to the alleged efforts of some of the defendants to seize control of the Union and to use Union funds thereafter to reimburse retroactively the expenses incurred in obtaining control; the second relates to alleged diversion of Union funds; the third relates to financial transactions between defendants apparently intended to show the flow of allegedly diverted Union funds; and the last relates to the obtaining of favorite financial treatment in return for concessions during contract negotiations.

A. Obtaining Control, Reimbursement of Election Expenses.

1. *Events prior to and immediately following the Cohen election:* In November, 1953 there had been a regularly scheduled general election of the Local, at which Grace was re-elected as President and Cohen defeated an individual named Crumbock as Secretary-Treasurer. The results were contested, a Trustee was appointed by the International Union, and a new election was held in April, 1954. At this election, Cohen was elected by a resounding majority (R. 3176a). After the election, the Recording Secretary Kelly (R. 3159a-3176a), who had supported Crumbock, was asked to resign and ultimately did. Walker was appointed to replace him. Kelleher (R. 1711a-1757a) and Fisher (R. 3277a-3286a), business agents, also Crumbock supporters, were also asked to resign (R. 3283a). The witness testified that although previously business agents had customarily been elected, Berman and others were thereafter appointed by Cohen. Hartsough became bookkeeper. There was also evidence that minutes of meetings which had formerly been kept in a copybook were thereafter typed and kept in a looseleaf book. Authorizations were filed with both banks for the Union account, permitting facsimile signatures of Cohen and Grace on checks under $1,000.00. It

is to be noted that Lapensohn was not employed by the Union until the last week in June of 1954.

2. *Reimbursement of election expenses and retroactive salary:* During the Cohen-Crumbock election, Local 169 of the I. B. & T. passed a resolution authorizing that Local to lend $3,000.00 to Local 107 and to pay printing bills, which amounted to $1,573.43, to support the election of Cohen and his slate (*Hartsough,* R. 3292a-3294a; *Fadigan,* R. 3304a-3308a). Later, these sums were repaid to Local 169 by checks from Local 107 (Exs. 743, 744). In addition, other bills for election expenses were repaid to Cohen by the Union, and Cohen received a check for retroactive salary for the period between November 1953 and April 1954.

3. *Payments to Cohen's election workers (Exs. 496 et seq.):* There were two checks drawn to cash, totalling $25,000.00, which were endorsed by Hartsough and which were used to pay individuals who worked for Cohen's election. A number of these employees (Graff, T. Charlton, F. Charlton, Doman, McNally, Price, Flanagan, Shenko, Brooks and Roski) testified that they received various sums of money and signed vouchers. There was testimony that the amounts shown on these vouchers were altered. There was no testimony showing who altered the vouchers.

4. *Trip to Miami (1954):* On July 12, 1954, a check (Ex. 709) in the sum of $1,000.00 was drawn by Cohen and Grace, and endorsed by Hartsough, supported by a voucher on Union letterhead (Ex. 710) covering expenses for a trip to Miami on February 15 and 16, 1954. However, there was testimony that the letterhead upon which the voucher was typed was not actually printed until June, 1954 (R. 3402a). In addition, another check (Ex. 711) in the amount of $5,673.80, payable to Cohen, was endorsed by Cohen and Hartsough, supported by vouchers (Ex. 712) bearing dates in January to May, 1954, on letterheads not printed until June, 1954.

B. Alleged Diversion of Union Funds.

5. *Friedman checks and insurance policies (Exs. 9, 12, 15, 17, 27, 30, 54):* During late 1954 and early 1955, a number of checks were drawn to the order of Jerome S. Friedman (R. 1557a-1564a) for the purchase of insurance policies on which petitioner Lapensohn was broker. There was evidence to show that Friedman (who died on November 21, 1961) did not sign these checks (R. 1574a). There was also evidence, that within a short time after all the checks to Friedman were drawn on Provident Tradesmens Bank and Trust Company, they were cashed at the Broad Street Trust Company (*Charlton*, R. 1555a-1564a). There was also evidence that at about the same time checks to Friedman were cashed, petitioner Lapensohn had deposits in his account at the Broad Street Trust Company and that the deposit slips showed the deposit of checks drawn on the Provident Tradesmens Bank and Trust Company in amounts similar to the Friedman checks (*Gretzinger*, R. 1579a et seq.). However, the testimony of Switt, Friedman's partner, also showed that Friedman received all moneys due him from Lapensohn for these policies (R. 3961a-3974a). There was evidence that the items insured under these policies consisted of sports equipment, boats and improvements to boats, with Raymond Cohen named as insured (Levering, R. 3975a-3987a). Some of these policies were placed by Raymond Cohen direct with Friedman.

6. *Katz's check (Ex. 22):* There was evidence that on January 10, 1956, a check was drawn by Local 107 on the Broad Street Trust Company, payable to Joseph E. Katz, in the sum of $1,000.00. An attorney named Joseph Katz (who testified that he never used a middle initial) testified that he did not work for this Union and never received this money. He had represented Lapensohn, but he had been paid for all services. He testified that he did not sign the check, and he does not know who did. There was evidence that on the same day the Katz check was cashed, a deposit

slip in Lapensohn's account showed the cashing of an unidentified $1,000.00 with $478.41 being deposited and the balance being given to the depositor. There was no direct evidence that this was the same check.

7. *Kanner checks (Exs. 34-39, 42):* During May, 1955 to August, 1956, several checks were drawn to the order of David Kanner. David Kanner, a Philadelphia attorney who represented the Union during the years 1954, 1955 and 1956, testified that the signatures on the checks were not his (R. 1761a to 1768a, 1781a-1784a), nor did he authorize anyone to sign for him (R. 1782a). But he admitted that all of his bills to the Union, totalling approximately $10,000.00, were paid, and he could not state how much of that money he received in cash, nor could he say that the money he received in cash was not the proceeds of these checks (R. 1782a-1783a). Another David Kanner, resident of Philadelphia, testified they were not his signatures either (R. 1811a-1813a). There was also evidence offered that on the same day that some of the checks were cashed there were deposits in Lapensohn's accounts reflecting similar amounts, although there was no direct testimony connecting these deposits with the checks. Mrs. Battisfore also testified that some checks were given to Lapensohn for transmittal to Kanner (R. 3433a). There was also testimony that Cohen made cash payments of $4,570.00 within two weeks of the cashing of three checks payable to Kanner in October, 1956 (*Young*, R. 2977a-2980a). However, there was no testimony connecting these incidents.

8. *Kirsch checks (Exs. 704, 705):* On December 20, 1954 a check for $4,000.00, and on September 24, 1954 a check for $4,500.00 marked "Returned election expenses" and "Repayment of Expenses" were drawn to Kirsch. Kirsch, who died April 8, 1958 (R. 3381a), was an employee of Rollee Advertising Agency, a corporation controlled by Lapensohn. These two checks were cashed by Kirsch at his bank and there were notations under the endorsements in-

dicating that Lapensohn's name or a similar name (one of the erased identifications was spelled "Lopinson") had been used to identify Samuel Kirsch to permit his cashing of checks. There were no vouchers to support these checks.

9. *Mastrin payment (R. 1789a-1801a, 3750a-3767a, Ex. 43):* Mastrin, an architect who did work for the Union in 1956, dealt with petitioners Lapensohn and Cohen. He testified that he submitted bills totalling $6,000.00 which were ultimately paid by the Union. On June 7, 1956 he received a check for $2,500.00 in partial payment which was brought to him by petitioner Lapensohn. He admitted that he went to the bank with Lapensohn and endorsed the check, gave it to Lapensohn to cash, then gave Lapensohn $1,000.00 of the proceeds. He did not ask for or receive a note, and never asked for the return of the money. However, he admitted that this money was his own and not the Union's at the time he turned it over to Lapensohn.

10. *Lazovitz-Marshall & Co.:* Robert Lazovitz and Morris Marshall were partners until 1956 or 1957, when they incorporated under the name of M. Marshall & Co., Inc. They entered into a contract with the Union on June 5, 1956 for the construction of a building in Wilmington. There was testimony that the signature on a check drawn to M. Marshall, dated April 16, 1956, in the sum of $2,967.95, was not Marshall's signature. There was no entry on the Company's books for this amount and no deposit in the Company's bank account at the time for that amount. The check was cashed at the Broad Street Trust Company on the same day that Lapensohn made a deposit in the amount of $482.60, consisting of $25.00 cash, two checks for $176.90 each, a check for $75.00, and a check for $28.80. There was no attempt to tie in Lapensohn's deposits with the aforesaid check to Marshall. In addition, there were checks from the Union to the Company for $10,080.00 and $4,800.00, but no entry appeared on the Company's books reflecting the $4,800.00, and there was no deposit in the Company's ac-

count at that time for that amount. The checks were endorsed "M. Marshall & Co., by Robert Lazovitz, President."

On the same day, Lapensohn's deposit slip shows a deposit of $1,253.75, composed of $980.78 in cash, checks of other banks for $150.00, $85.00 and $38.00. There was nothing on the deposit slip or the checks to show any connection between them. There were also checks to the Marshall Co. for $955.00 and $3,125.00, with no entries in the corporate books and no deposit slips in the Company's account. There was also no direct testimony connecting Lapensohn.

11. *International Convention in Miami (1957):* There is testimony that there were five checks, all dated September 16, 1957, drawn to five of the defendants, not including petitioner Lapensohn, in varying amounts, to be used for expenses in connection with the Teamster's Convention in Florida at the end of September and beginning of October, 1957. One (Ex. 718) was a check to Cohen for $3,000.00, one (Ex. 868) was a check to Grace for $2,500.00, another (Ex. 869) was a check to Elco for $1,570.00, another (Ex. 870) was a check to Walker for $2,000.00, and the last (Ex. 871) was a check to Berman for $2,000.00. There was testimony that Cohen's check was deposited with the Seville Hotel at Miami Beach, Florida, on September 16, 1957, the same day it was drawn (R. 3488a-3490a); Grace's check bore the genuine endorsement of Grace and was cashed; Elco's and Walker's checks bore the endorsements of those individuals and of Hartsough, and there was testimony that Hartsough was authorized to sign their names and that both checks were cashed. There was no further testimony as to the date of cashing those checks. However, *the exhibits themselves showed that all except Grace's check were cashed on September 16. Grace's was cashed September 19, 1957. There was no testimony as to who cashed Grace's check or where it was cashed.* There was testimony that the Hotel Seville's record showed that Cohen's expenses amounted

to $1,500.00 (R. 3492a), that he received change from his original deposit and subsequent deposit; Walker's expenses at the hotel were $285.19; Elco's were $127.77; Berman's were $512.20; and Grace's amounted to $605.43. An employee of Eastern Airlines testified that the round-trip fare, first class, at that time amounted to $155.87. This evidence was offered in an attempt to show that those specific defendants received more money than their actual expenses, and was offered as proof of the last overt act in the alleged conspiracy.

12. *Clothing purchases at Diamond & Co. (Exs. 68-92):* Employees of Diamond & Co., clothing retailers in Philadelphia, testified that they sent statements to Cohen in 1955 for purchases of clothing, and received Union checks in payment thereof. There is testimony concerning sales slips covering items charged to Cohen's account by Union employees, including a purchase by Walker. There was no direct evidence that those purchases were for the personal use of any of the defendants.

13. *Horn & Hardart strike (Exs. 119-239):* In May, 1955 to May, 1956, various individuals were paid by the Union to picket Horn & Hardart in an attempt to organize that company. The Union drew checks to cash, which were endorsed by Hartsough, and the vouchers for those checks showed payments to various individuals for working on the picket line. A number of those individuals were called to testify that they received $30.00 per week in sealed envelopes, and signed the vouchers in blank. They identified their signatures but not the amounts appearing after their names, some of which exceeded $30.00. Several testified that they were usually paid by an individual named Lindsay, who died September 27, 1960 (Ex. 276); some testified that Elco was sometimes there and that Cohen and Hartsough appeared at headquarters once or twice at the beginning of the strike. A few of the vouchers were signed by Elco on behalf of some of the men who testified that they

had received the money and others authorized Elco to get it for them since they were busy at paytime (Owens, Bailey, Burton). Elco paid the rent and expenses for strike headquarters. It should be noted that this evidence was ruled by the judge as being immaterial as to petitioner Lapensohn (R. 2265a, 2453a-2468a).

14. *Gallagher strike (1957):* There was testimony that members of the Union were paid for picketing Gallagher & Sons during the year 1957, during a strike. Checks totalling $29,710, drawn to cash, were endorsed by Hartsough. A number of the employees testified that they received $40 per week for picketing and that they signed vouchers when they received their money but did not fill in the amounts. The amounts reflected on those vouchers, in some instances, showed more than that sum. They testified that Hartsough paid this money to them. There was no direct evidence to show who inserted the figures on the vouchers.

C. Financial Transactions Between Defendants.

15. *Grace checks (Exs. 278-300, 332-447):* Evidence was offered to show that a large number of checks were drawn by the Union, payable to Grace, for the period April 18, 1955 to April 14, 1957. There was no evidence that these amounts were deposited in his bank account, and there was testimony that some of the endorsements were not in Grace's handwriting. Some of those bore other persons' endorsements. Grace's bank account showed deposits usually in round figures (R. 2611a-2675a). Grace suffered a stroke in March, 1954, and was incapacitated at divers times, but he was capable of performing duties during 1956 to 1958, and even drove a car. Mrs. Grace testified that she saw him sign blank checks.

16. *Lapensohn checks from the Union (Exs. 493, 494, 495):* Lapensohn received three checks, one on September 14, 1955 ($850.00), one on September 15, 1955 ($812.50), and one on October 11, 1955 ($1,000.00), totalling $2,662.50,

without any vouchers supporting them (R. 3008a-3033a). However, the witness testified there were many checks without vouchers. Mrs. Battisfore identified stubs in the check book (Ex. 713) representing payments to Lapensohn in the following sums: $1,000; $1,000; $1,250; $950; $1,045; $955; $902; the amount on the next one is unknown; $1,000.72; and $919. Also see testimony of Flanagan (R. 3919a-3931a). Flanagan admitted that there were many disbursement checks which were not supported by vouchers (R. 3938a). In addition, there were 122 checks (Exs. 745-867) representing salary payments to Lapensohn from July 2, 1954 to November 1, 1956, representing gross salary of $200.00 per week (from July 2, 1954 to January 4, 1956), and $225.00 per week thereafter.

17. *Cohen-Lapensohn financial transactions:* A Lapensohn check dated September 14, 1956, payable to cash in the sum of $2,000 (Ex. 492), was cashed at the bank without endorsement. The name "Joe Hartsough" appeared next to the name of the maker, with the name "Ray" in parentheses. In addition, there was a check from Lapensohn to Cohen in the sum of $2,500 dated June 20, 1956 (Ex. 51), the purpose of which was never demonstrated. There was no direct testimony offered to show what happened to the proceeds of either of these checks.

18. *Cohen boat purchase (Ex. 45):* On March 30, 1955, a treasurer's check was drawn by the Broad Street Trust Co. and charged to the account of Ben and Esther Lapensohn, for $17,000 payable to Earl M. Reed. Keagle (R. 1828a-1824a) testified that he sold a boat to Cohen and received a treasurer's check for $17,000 payable to Reed.

19. *Cohen's financial condition:* Young (R. 2976a *et seq.*) testified that Cohen made cash payments of $4,570 on account of a home in Brigantine, New Jersey, in October, 1956, and total payments of $28,471 during the period July 1956 to May 1957. He admitted that he was with

Cohen when a $15,000 mortgage was created on the home. There was also testimony that Cohen received the proceeds of 166 checks (Exs. 508-670) which were payable to Cohen or to cash, and were endorsed by Cohen or Hartsough. These amounted to $20,625.00 and there were no vouchers to support them. However, there was no direct testimony tending to show what happened to the proceeds of those checks.

Mr. Stern (R. 3662a *et seq.*) testified that he paid Cohen $2,000 cash in 1954 for the purchase of a boat. Christiani (R. 3691a *et seq.*) testified he paid Cohen $9,000 on February 4, 1957 for an insurance loss to a boat. Ciliberti (R. 3697a *et seq.*) testified about the status of Cohen's bank account in 1956 and 1957. Kurowski (R. 3713a *et seq.*), of the Boardwalk National Bank, testified about a $15,000 mortgage created December 5, 1956 by Cohen and payments made thereon. Parkinson (R. 3781a *et seq.*), operator of The Sailfish Center, testified about payments made by Cohen. Gordon (R. 3791a *et seq.*) of the Gordon Boat Co., testified about Cohen's purchase of boats in 1956 and 1957. Sherwood (R. 3818a *et seq.*) a boat captain, testified he worked for Cohen for 15 weeks in 1956. Mitchell (R. 3825a *et seq.*) testified he sold the property in Brigantine to Cohen in 1956 and that Lapensohn, who is a real estate broker, represented Cohen as his agent at the settlement. Gretzinger (R. 3822a *et seq.*) testified about bank loans made to Cohen during 1956 and 1957, and payments made in 1957. Flanagan (R. 4035a *et seq.*) testified about the leasing of a property in Florida by Cohen in 1955.

There was no direct testimony tending to show that Cohen used proceeds of any funds illegally diverted from the Union. However, the Commonwealth offered the testimony of a government accountant, Ralph A. DeCarlo, in an attempt to show that Cohen's expenditures during a period of time exceeded his known financial resources during that time (R. 4040a *et seq.*). He was permitted, over objection,

to testify from charts based on an arbitrary period, part of which occurred after Mr. Lapensohn's connection with the Union had terminated, and which related to the financial condition of Cohen alone. There were no instructions to the jury limiting the use of the chart to each specific defendant. Furthermore, the witness was permitted to testify even though he admitted that the charts were incomplete, inaccurate and based on information not introduced in the evidence (R. 4124a-4186a).

D. Alleged Favored Financial Treatment.

20. *Trailer Drops, Food Fair Properties, Inc. and Dan River Mills Stock:* Magil (R. 1907a) testified that Eastman Dillon Co., underwriters of the stock issues, in September 1956, received a list of persons (Ex. 56) to receive favorable treatment in the purchase of Food Fair Properties, Inc. stock. This list, which he received from Louis Stein, contained the names of Cohen and Lapensohn, which were crossed out, and in substitution thereof was inserted the name of Lapensohn's brother-in-law, Jack Shore. He admitted that he also received many other names and testified that the company was under no obligation to honor the list. Richardson (R. 1984a), Trust Officer of the First Merchants Bank of Richmond, stock transfer agents for Dan River Mills, Inc., testified that in July 1955, 100 shares of that stock were transferred by Samuel Mandell to Petitioner Lapensohn.

There was testimony that Jack Shore purchased twenty units of Food Fair Properties, Inc. for $10,000 (R. 2225a). Mandell (R. 2224a) testified that he transferred 500 shares of Dan River stock to Lapensohn for $10,000.

Louis Stein (R. 2193a *et seq.*) testified that in March, 1955, at Lapensohn's request, he offered Lapensohn 500 options in Dan River stock at $20 per option, which were exercised in June, 1955 (R. 2196a-2198a). In August, 1955 Lapensohn asked if he and Cohen could each get 1,000 shares of Food Fair Properties, Inc. common stock (R.

2200a). Stein promised to suggest his name to Eastman Dillon. There were 1,100 names on the list, consisting of forty or fifty sheets of paper, which Stein finally supplied to Eastman Dillon, and only twenty of those names were connected with labor unions; the others came from all walks of life (R. 2208a-2210a). The reason he included Lapensohn's name was that he was a well-known figure in Philadelphia, particularly in labor circles. At the same time, Lapensohn asked Stein if Shore could purchase two hundred units of Food Fair Properties, Inc. debentures, worth $10,000 (R. 2204a-2205a).

The Commonwealth also offered the testimony of several witnesses who testified about negotiations (which negotiations were concluded on or about September 17, 1954) by the Union with food retailers concerning "trailer drops". Mr. Cupp (R. 2042a *et seq.*), president of Acme Stores, Inc., defined a trailer drop as permission for the food retailer company to leave a trailer loaded with merchandise at a store without unloading it on the spot. In 1954, during contract renewal negotiations, one of the issues the company was nogotiating for was additional trailer drops. Cupp testified that Food Fair had more drops than the other companies, but he admitted that they had more even before these negotiations commenced. He also testified that as a result of these negotiations Food Fair ultimately had to put on an additional twenty men, costing between $75,000 to $80,000 annually. Kramer (R. 2110a *et seq.*) of Rabiger-Kramer, Inc., contract carriers for A&P, testified that under the contract negotiated by Cohen's predecessor, Crumbock, his company had been entitled to no trailer drops. Until the new negotiations in 1954, they were allowed twenty-five drops, but after the 1954 negotiations his company was allocated fifty drops (R. 2116a). Food Fair had 283 drops before the June 1954 negotiations; afterward, they still had 283 drops but had to hire an additional twenty men.

Gannon (R. 2132a *et seq.*), president of Motor Transport Labor Relations, negotiated with the Union on behalf of the food retailer companies. He dealt with Cohen, although Walker and Hartsough walked in and out during negotiations. Before the negotiations, Food Fair had 283 drops and afterward Food Fair still had 283 drops but had to put on twenty additional men. The other companies received a proportionate amount as a result of these negotiations. American Stores received fifty under these negotiations with the promise of reconsideration the following year.

This evidence had been offered by the Commonwealth in an attempt to justify an inference that Cohen gave favored treatment to Food Fair in return for allegedly favored financial treatments for him and Lapensohn. However, there was no testimony supporting the contention that Food Fair received any benefits, nor that the negotiations were a quid pro quo as to the financial transactions. There was also no testimony offered to show that this conduct was pursuant to any alleged conspiracy between the parties.

REASONS FOR GRANTING THE WRIT.[5]

From the pre-indictment proceedings until the refusal of the Supreme Court of Pennsylvania to review the case, petitioner has been hastened on his way to jail by rare and unusually hasty proceedings with complete disregard on the part of the Commonwealth and the State courts for his constitutional rights to a fair and orderly determination of his guilt. First he was indicted without a preliminary hearing—such as is customarily granted to all other defendants in Pennsylvania—and without any showing that there

5. Four of the other five defendants in this proceeding are filing a separate petition for writ of certiorari. Many of the reasons contained therein are equally applicable to this petitioner and are thus adopted as if incorporated herein.

was a necessity for dispensing with such a hearing as to him. Then he was forced to trial without being given a reasonable opportunity of guaranteeing the selection of a fair jury. He was thereafter convicted of a crime as to which the statute of limitations barred the prosecution, at a trial in which the presiding judge acted like an arm of the prosecutor. The conviction was based on mere suspicion and a mass of evidence none of which tended to show petitioner's complicity in the crime charged. After conviction, the trial court hastened him through the post-trial motions to reach its pre-conceived conclusion, then refused bail pending appeal (a rare event in Pennsylvania) and effectively cut short the normal time for taking an appeal. The appellate courts did nothing to correct these errors. First, the intermediate appellate court compounded the haste by refusing a short and reasonable continuance necessary to enable proper presentation of the appeal. Perhaps as a result of this that court in rendering its decision misinterpreted the evidence and arguments and then refused to hear reargument even though specific inaccuracies were pointed out. Then, even though many serious problems of constitutional law and criminal procedure were raised, and even though they were of such weight as to justify a dissent in the Superior Court, the Supreme Court washed its hands of the matter and refused to review the proceedings. Accordingly, these proceedings should be received to protect the constitutional rights of this petitioner (along with his co-petitioners), as well as to guarantee the very sanctity of constitutional criminal process in the Pennsylvania courts.

1. Petitioner Was Deprived of a Preliminary Hearing Before Indictment.

There can be no doubt in Pennsylvania that, absent extreme justification, defendants charged with conspiracy are entitled to a preliminary hearing. It is clear that there

had always been a common law right to such a hearing, subject to certain exceptional proceedings. This was discussed by the Supreme Court of Pennsylvania in *Commonwealth v. Hoffman*, 396 Pa. 491, 152 A. 2d 726 (1959), and cases cited therein. Such a right was recognized and delineated by the Pennsylvania legislature in the Act of May 14, 1915, P.L. 499, PA. STAT. ANN. tit. 42 § 1080, which provides that:

> "Hereafter, upon a preliminary hearing before a magistrate for the purpose of determining whether a person charged with any crime or misdemeanor against the laws, except murder, manslaughter, arson, rape, mayhem, sodomy, buggery, robbery or burglary, ought to be committed for trial, the person accused and all persons on behalf of the person accused, shall be heard if the person accused shall so demand."

Since the crime charged in this indictment was not one of the exceptions mentioned in the statute (as was the case in *Commonwealth v. O'Brien*, 181 Pa. Super. 302, 124 A. 2d 666 (1956), *appeal dismissed*, 389 Pa. 109, 132 A. 2d 265 (1957)), the petitioner had a positive legal right to such a hearing, unless it fell within one of the recognized common law exceptions. In *Commonwealth v. Green*, 126 Pa. 531, 17 Atl. 878 (1889), the Supreme Court of Pennsylvania enumerated the three common law exceptions to the requirement for a preliminary hearing. The first involves an investigation of matters of general public import, directed by the courts. The Commonwealth did not proceed under this exception here. In fact, the Supreme Court of Pennsylvania had already ruled that the alleged incidents were not such a matter of general public import. See *Petition of Grace*, 397 Pa. 254, 154 A. 2d 592 (1959). The second involves those cases where the Grand Jury takes notice of the offense from its own knowledge and observations. This was not the case here. The third exception involves those cases where the prosecutor prefers an indictment before

a Grand Jury when there is occasion for great haste or when the exigencies of the case and public interest reasonably require such procedure, which must be under the supervision of the court. This is the reason alleged in the case at bar.

It was argued by the other petitioners in the courts below that any haste or exigency resulted from the conduct or inaction of the District Attorney. This argument was rejected by the lower courts, and the validity of their decision is being argued by the other petitioners here. However, even if the danger of the running of the Statute of Limitations brought the cases of the other defendants within the exception, and whether or not that emergency is chargeable to the District Attorney, it is manifestly clear that *no emergency or reason for haste existed as to petitioner Lapensohn.*

Petitioner Lapensohn was not a resident of the Commonwealth from May 9, 1957 until July 3, 1958. This fact was known by the District Attorney and by the indicting Grand Jury, since it was contained in the very indictment found by the Grand Jury. Furthermore, Lapensohn had terminated his relationship with the Union on or about November 2, 1956, as the District Attorney and the Grand Jury knew. Accordingly, if his absence from the Commonwealth for 14 months tolled the Statute of Limitations for that period of time, then the Statute of Limitations would not have expired until January 1960. The District Attorney thus had four months in which to obtain a warrant, hold a preliminary hearing and present testimony to the Grand Jury relating to Lapensohn. If, on the other hand, his absence from the jurisdiction did not toll the Statute, as might have been shown at a preliminary hearing, then the statute would have run in November 1958 (two years after he terminated his relationship with the Union), and any indictment would have been invalid and should have been quashed.

Judge Gold, in his opinion approving the procedure utilized by the District Attorney, made no reference to the fact that Lapensohn's absence from the Commonwealth put him in a different position, even though this had been argued in a supplemental brief filed with the court. The argument was also made before the Superior court but was completely ignored by it in its discussion of the validity of the indictments found without preliminary hearings.

Thus, the deprivation of his right to a preliminary hearing seriously prejudiced Petitioner Lapensohn and deprived him of the protection accorded to all other defendants charged with similar crimes, thereby denying him of equal protection of the laws guaranteed by the Constitution.

2. Petitioner Was Deprived of a Fair Trial and a Fair and Impartial Arbiter.

This Court, as well as the Courts of Pennsylvania, has underscored the necessity of a trial judge maintaining an "atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding." *Glasser v. United States*, 315 U. S. 60, 82 (1942); see *Commonwealth v. Claiborne*, 175 Pa. Super. 42, 102 A. 2d 900 (1953); *Quercia v. United States*, 289 U. S. 466 (1933); *DiBona v. Philadelphia Transportation Co.*, 356 Pa. 204, 216, 51 A. 2d 768, 774 (1947).

Whether caused by the large amount of publicity adverse to the defendants before and during the trial, or by the efforts of counsel for the various defendants in attempting to protect to the fullest extent the respective and often adverse interests of their clients, the judicial atmosphere of the trial was strained from the very beginning. It is respectfully and regretfully submitted that during the trial the judge failed to act as an impartial arbiter, on a number of occasions even assuming the role of prosecutor, and abandoned his duty of seeing that the trial was "conducted with solicitude with the essential rights of the accused." *Glasser v. United States, supra*, 315 U. S. at 71. This was demonstrated by rulings of the trial judge which not only

were consistently adverse to defendants, but were frequently accompanied by derogatory comments directed against defense counsel and their tactics. On many occasions the trial judge became an advocate, cross-examining witnesses, suggesting inferences not necessarily based on facts, making unfair comments on evidence, and finally rendered an argumentative charge. It was accordingly no surprise that the jury rendered a verdict of guilty as to all six defendants, after deliberating little more than one hour, even though the testimony had taken more than ten weeks and more than 1,100 exhibits were introduced, and even though the evidence was entirely circumstantial.

Even though counsel represented divers, and even adverse interests—so adverse in fact that under recent decisions of the Pennsylvania Supreme Court, it would have been reversible error for one counsel to represent more than one defendant: see *Commonwealth v. Meehan*, 409 Pa. 616, 187 A. 2d 579 (1963); *Commonwealth ex rel. Whitling v. Russell*, 406 Pa. 45, 176 A. 2d 641 (1962)—nonetheless, the trial judge on a number of occasions criticized counsel for failure to agree and for failure to cooperate.[6]

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6. Several examples follow:

"The Court: Ladies and gentlemen, I have just wasted another half-hour. You are excused until two o'clock, for lunch." (R. 1545a)

"Gentlemen, you will have to get together. I will not be put in the position where some of you insist on one thing, some of you urge exactly the opposite. That, I think, is something that, as a trial judge, I am entitled to insist upon." (R. 1552a)

(This occurred in chambers.)

"The Court: Gentlemen, gentlemen, gentlemen, we will proceed and prove it in the way you are doing. This division among counsel makes such agreements impossible." (R. 1586a-87a)

"Gentlemen, may I say this, that I realize team work is not easy, whether there is integration of effort or interlocking of effort, but one of you gentlemen objects to an answer and when the objection is sustained, and the answer ordered stricken, another one of the group wants to bring out the same information on cross-examination that I sustained an objection to when it

On a large number of occasions, some out of the presence of the jury, but mostly within the hearing of the jury, the defense counsel was criticized or objections made by the defense were belittled. For example, the Court frequently referred to objections by defense counsel as being "without merit" or "completely without merit" (*inter alia*, R. 1524a, 1549a, 1578a, 1626a, 1646a, 1649a, 1651a, 1723a, 1744a, 1984a, 2764a, 2800a).

The Court commented in the presence of the jury about defense counsel's "pointless repetitive asking of the same question over and over again" (R. 1952a). Other belittling, facetious or sarcastic comments about defense counsel's objections are set forth:

> "The Court: The thing I am amused at, and I suppose I am entitled to be amused, is that two minutes ago Mr. Witkin got a crown of glory for waiving a technical objection, and two minutes later he makes the same objection." (R. 1582a-83a)

> "The Court: Gentlemen, this is a mountain over a mole hill—it is trying to make a mountain out of a mole hill, to get my analogies, and I have already ruled on it." (R. 1692a)

> "The Court: My regrets. No better success. The objection is overruled." (R. 1693a)

> "Mr. McLaughlin: . . . And I submit to Your Honor, all of these answers have been inflammatory, prejudicial, and everything else that I can think of, to the rights of the defendant Elco."

> "The Court: You mean you have run out of adjectives?" (R. 1739a)

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was brought out on direct examination. I think it cannot help but confuse the record, and very possibly confuse the jury. They might well be wondering why I refused to permit it when one person asked it, and permit it when a different person asked it, and permit it when a different lawyer asked it." (R. 1749a-50a)

Similar comments can be found sprinkled liberally throughout the trial.[7] On a number of occasions the Court commented on the lack of good faith or frankness of defense counsel (R. 1663a, in open court; R. 1869a, 3675a-76a, in chambers or side bar), while on the other hand in front of the jury he praised the District Attorney on his good faith and integrity (R. 1742a).

On many occasions during the course of the trial, the court gave unsolicited assistance to the prosecution by examining witnesses to counteract the effect of cross-examination, by eliciting inferences favorable to the prosecution, and by sustaining objections that were not even made. For example, when a witness was asked a question by defense counsel without objection from the District Attorney, the court stated:

> "The Court: Do I hear an objection? If so, I will sustain it.
>
> "Mr. Specter: I object, Your Honor.
>
> "Mr. Witkin: If Your Honor please, all right.
>
> "The Court: Of my motion, sua sponta, to use the Latin, I hold that as an improper question and won't permit it.
>
> "Mr. Witkin: If Your Honor please, I move for the withdrawal of a juror.
>
> "The Court: That again, is denied." (R. 1971a-72a)

At a later point, where the testimony relating to the cashing of checks which the Commonwealth tried to show represented diverted funds, the Court on its own motion instructed the jury that, "There is no obligation on the Commonwealth to produce these fellers. It is a perfectly

7. See: R. 1655-56, 1735, 1854, 1903-04, 2041, 2062, 2109, 2404, 2415, 2751-54, 2793-95, 2807, 2830, 3015, 3083, 3142, 3148-49, 3182, 3185, 3191-94, 3200, 3678-80, 3727, 3761, 3790-91, 3894-95, 4182-83.

proper question to ask. But I am also saying that there is no obligation on the Commonwealth to do so" (R. 2604a). At another point the Court volunteered to sustain an objection that the Commonwealth did not even want to make (R. 3011a). On another occasion the Court, without any objection by the District Attorney, made an objection and then sustained himself (R. 3190a-92a). Again, without any objection from the District Attorney, an objection was sustained and an answer stricken from the record on the Court's own motion (R. 3207a-08a).

On two occasions the Court cross-examined witnesses to minimize the effect of cross-examination by defense counsel and to rehabilitate their testimony. For example, during cross-examination of the hand-writing expert witness, Cadigan, the following colloquy took place:

"By Mr. Witkin:

Q. At any rate—leaving that subject—we can agree that you have absolutely no testimony to offer in this case that this signature, 'Jerome S. Friedman' was written by any one of the three persons whose names I have mentioned, to wit, Ben Lapensohn, Ray Cohen and Joe Grace. That is correct, isn't it?

A. Yes, sir.

By The Court:

Q. Is it equally correct, sir, to say that you are unable to say that it was not written in the handwriting of any of those three people?

A. That is correct, sir." (R. 1625a)

During cross-examination of the witness Patterson, the following took place:

"By The Court:

Q. Mr. Patterson, did you ever get more than $30, regardless of how much you did get, what the slips said —did you ever get more than $30?

A. Well, right off hand, Your Honor, I can't recollect to it.

Q. You don't remember ever getting more than $30. Is that right?

Mr. McLaughlin: If Your Honor pleases, he didn't say that.

A. I don't recollect to it. I can't remember that far back." (R. 2421a)

During examination of the witness Gorman, the Court called the jury's attention to, and highlighted portions of the signed statement of the witness (R. 347a), normally a function of the District Attorney.

During the course of the trial the judge consulted with several witnesses off record and without the presence of defense counsel, but in the presence of the jury (R. 2766a-67a, 2790a-94a, 2990a). Yet, on another occasion the Court sarcastically commented about one defense counsel talking with a witness without drawing objection from other defense counsel (R. 3142a).

In another instance, the trial judge interrogated two prospective witnesses, Robert Lazovitz and Morris S. Marshall, with their counsel and the District Attorney present, but excluded the defendants and their counsel from the conference. During the course of the conference, a portion of which was transcribed stenographically, the judge even instructed the District Attorney as to what questions he would allow the District Attorney to ask (R. 2688a-2706a). Not only was this in itself prejudicial, but the prejudice was compounded by the fact that these witnesses, through their attorney, had previously informed the District Attorney that they intended to assert their privilege against self-incrimination. This type of conduct has been severely criticized, particularly where the evidence is not essential to the case, or where a witness was not called in good faith. See *Namet v. United States*, 373 U. S. 179,

10 L. ed. 2d 278.(1963), and cases cited therein. Although there is no evidence that the witnesses were not called in good faith, their testimony was certainly not essential to the case.

Furthermore, during the course of this trial, the trial judge noted that he had made some inquiries and investigations concerning a witness now on the stand, Mrs. Battisfore. The Court referred to matters which "You do not know, but I do know, that in my opinion she was seriously threatened last night by people who are not strangers to you, and I could not think of making her address available for fear for her safety" (R. 3522a). The Court refused to divulge the nature of that information. There is absolutely no evidence supporting any implication of impropriety or in any manner connecting appellant or any other defendant with such sinister conduct as hinted here. At any rate, such extra-judicial investigations and exposure of the judge to information not in the record, has been strongly criticized, even where the information related only to a witness rather than to a defendant. See *Chrisos v. United States*, 291 F. 2d 535 (7th Cir. 1961). Also see *Smith v. United States*, 360 U. S. 1 (1959); *Smith v. United States*, 223 F. 2d 750 (5th Cir. 1955); *Stephan v. United States*, 133 F. 2d 87 (6th Cir. 1943); *McFadden v. United States*, 63 F. 2d 111 (7th Cir. 1933).

Although it is not suggested that the trial court's conduct reached the depths of judicial intemperance so strongly criticized in *Commonwealth v. Claiborne*, 175 Pa. Super. 42, 102 A. 2d 900 (1953), nonetheless there was an "air of hostility" pervading the trial which prevented the defendants from receiving a fair trial. See *United States v. Standard Oil Co.*, 316 F. 2d 884, 895 (7th Cir. 1963). The remarks of the Circuit Court in the following case, cited in *Standard Oil*, while addressed specifically to a Federal trial, are equally applicable to State courts:

> "The judge conducting a jury trial in a Federal Court is more than a 'mere moderator'; he is 'the gov-

ernor of the trial for the purpose of assuring its proper conduct' . . . He has the prerogative, and at times the duty, of eliciting facts he deems necessary to the clear presentation of the issues. To this end he may examine witnesses who testify, and even call witnesses on his own motion. . . .

In eliciting facts, however, and in attempting to expedite the trial, and in furtherance of justice, *the judge must be careful to preserve an attitude of impartiality, and to guard against giving the jury an impression that the court believes the defendant is guilty.*" *United States v. Fry*, 304 F. 2d 296, 298 (7th Cir. 1962). (Emphasis supplied.)

In the case at bar the trial judge did not preserve an attitude of impartiality and could not fail but to give the impression to the jury of his belief in the guilt of the defendants. This air of hostility went so far as to apply not only to the defendants, but to a witness who was an officer of the same Local, Edward Battisfore. When that witness, the president and business agent of the Union, was called to testify about, and to identify, books and records of the Union (even though he was not their custodian, as the District Attorney well knew), he was unable to identify them. The Court interrupted his testimony and instructed one of the defense counsel to call the witness' attorney to the court room. Thereafter, in a conference (out of the hearing of the jury and of the witness), the trial judge expressed a belief that the witness was lying and announced that he was considering sitting as a committing magistrate to hold the witness for perjury. This was communicated to the attorney for the witness, who was thereafter instructed not to tell the witness what had been said, since he "might be unduly influenced to tell the truth" (R. 2785a).

The effect of all of this was not only to cause undue pressure and coercion on the witness, but was to convey graphically to the jury that the witness was not telling

the truth. Since he was an officer of the Union, and apparently a friend of the defendants, this incident made it appear as if it was an attempt on the part of the defendants to obstruct justice.

Although the subject matter of the testimony was relatively unimportant, and the testimony, in and of itself, of the witness, even after the implicit coercion, did not damage the defendants, the effect of the Court having told the witness not to leave the court room, to step down and stay here was devastating, and highly prejudicial to appellant and the other defendants.

Perhaps the most serious error by the trial judge in the conduct of the case, arising from his apparent hostility toward the defendants was his stringent limitation on cross-examination.[8] In connection with this, defense counsel was prevented from cross-examining witnesses concerning notations on stubs in check books which had been offered in evidence. See, for example, *Gretzinger* (R. 1621a, 1692a-1693a, 3011a-3012a); *Conlan* (R. 2554a); *Cadigan* (R. 2558a-2559a); *Flanagan* (R. 3394a-3395a; 3923a *et seq.*). Even though the Court based its ruling particularly on the fact that the books had not been authenticated, and despite the District Attorney's unfulfilled promise to do so, the Court permitted the District Attorney to ask such questions of Marjorie Battisfore (R. 3450a *et seq.*). This improperly impaired the cross-examination while permitting the prosecution to present improper testimony on direct examination.

The trial judge also refused to permit cross-examination of Marjorie Battisfore as to her address, which was desired for the purpose of determining a possible motive for prejudice. This was clearly error. *Alford v. United States*, 282 U. S. 687 (1931). The Court also restricted examination of Flanagan concerning minutes of the

8. See, for example: R. 1611-12, 1951, 1955, 1963-64, 2069-73, 2164-69, 2928, 2932-34, 2959-62, 2963-64, 2993-94, 3065, 3089-91, 3177-78, 3251, 3394-95, 3463-67, 3518-26, 3527, 3560-62, 3765-67, 3807-09, 3812-13, 4038-39, 4138-43, 4154, 4166, 4171-72a.

Union's meeting in an attempt to determine whether they reflected an authorization of expenses which had been testified to by the witness (R. 4038a-4039a).

Although the scope of cross-examination is a matter for the discretion of the trial court, limitations on the right of cross-examination, far less stringent than involved here, have been criticized by this Court, as well as by the courts of Pennsylvania. See *Alford v. United States*, *supra*; *Kaplan v. Loev*, 327 Pa. 465 (1937); *Lenahan v. Pittston Coal Mining Co.*, 221 Pa. 626 (1908); *cf. Commonwealth v. Petrofsky*, 194 Pa. Super. 94, 166 A. 2d 682 (1960). Also see *United States v. Standard Oil Co.*, 316 F. 2d 884, 892 (7th Cir. 1963).

These were not mere isolated incidents which occurred during the course of the lengthy trial. The reading of the record of this trial will show that from beginning to end the petitioner and his co-defendants had an opponent, not an impartial arbiter, presiding on the bench. The only answer given by the Superior Court was the two-pronged statement at the end of its opinion that the trial judge maintained his composure, and that the evidence was sufficient to justify the convictions of all of the appellants and they received a fair trial (Appendix C, page 36a). It is respectfully submitted that the constitutional test of whether petitioner received a fair trial is not founded upon the trial judge's ability to maintain his composure, nor upon the quality of the evidence. The test is whether petitioner received a trial free from prejudice conveyed by the trial judge to the jury. It is respectfully submitted that petitioner here was deprived of such a fair trial as guaranteed by the Constitution.

3. Petitioner Was Deprived of Effective Assistance of His Counsel.

The inordinate haste with which petitioner was rushed from conviction to ineffectual but final review by the appellate courts is not typical of cases in Pennsylvania, in any other state in this union, or in any nation following

Anglo-Saxon principles of jurisprudence. For the trial court to require counsel to file, brief and argue post-trial motions within one month, after completing a trial lasting more than ten weeks, without adequate opportunity to review the notes of testimony covering more than 4,500 pages, and without opportunity to tend to office affairs, constitutes unusual pressure on counsel. To compound this by refusing bail, thereby compelling the taking of an immediate appeal rather than permitting utilization of the 45 days normally permitted by rule of Court, is to add insult to injury. For the Superior Court then to refuse a continuance and to require filing of briefs *without having a printed record available, and without even seeing the trial court's opinion*, is virtually to deprive petitioner of his counsel's services. For the Supreme Court of the State thereafter to refuse to review the proceedings, even though issues raised were substantial enough to obtain a dissent in the Superior Court, practically amounts to an abandonment of its judicial obligation.

To require counsel to attempt to prepare this trial and appellate proceedings under circumstances above set forth is to mock the constitutional requirement of assistance of counsel under the Sixth Amendment as made obligatory upon States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U. S. 335, 342, 9 L. ed. 2d 799, 804 (1963). To sanction the proceedings followed by the trial and appellate courts here is equivalent to eliminating the requirement for representation by counsel at post-conviction stages. These stages are obviously no less important than the pre-trial stages so zealously guarded by this Court. *Escobedo v. Illinois*, U. S. 12 L. ed. 2d 977 (1964); *Massiah v. United States*, U. S. 12 L. ed. 2d 246 (1964); and cases therein cited.

4. Petitioner Was Convicted of a Crime Barred by the Statute of Limitations.

The dissenting opinion of Judge Watkins in the Superior Court succinctly sets forth the failure of the Common-

wealth to prove that an overt act took place within the statutory period of time. The crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, since that determines the duration of the conspiracy and whether the act relied upon as an overt act may properly be regarded as in furtherance of the conspiracy. *Grunewald v. United States*, 353 U. S. 391 (1957). Here it is clear that the scope of the agreement charged did not encompass the division of spoils. Thus, the last possible overt act in connection with the conspiracy charged was the *issuing* of the checks on September 16, 1957, not their cashing. The theory of the Commonwealth was that, as part of the conspiracy to cheat and defraud the Union, the defendants drew checks for more money than they actually later expended for legitimate convention expenses (noting that Lapensohn was not involved in this at all). Under this theory it was the drawing of the checks which was the significant last overt act in *furtherance of the conspiracy*. The later actual spending of the money for convention expenses clearly could not be in furtherance of the conspiracy since the more they spent the less there would be for their own personal use, and the expenditures would thus be in derogation of such a conspiracy. Likewise, pocketing of the proceeds would not represent part of a conspiracy, since the conspiracy alleged did not embrace the division of spoils. See *United States v. Bonnano*, 285 F. 2d 408 (2d Cir. 1960). The cashing of the checks was not part of the conspiracy charged, but represented the consummation of the substantive crime. If the checks had never been cashed, certainly the Commonwealth would still have charged that drawing them would be an overt act extending the conspiracy.

The majority of the Superior Court included only that the jury could infer that Joseph E. Grace received of his check on September 19, 1957, the date of the bank stamped on the reverse side. However, as the dissenting opinion points out, this would not be an inference but "pure guess-

work" since there was no evidence that it was paid to Grace, but could have been paid to anyone, since it was a bearer instrument.

If then, the statute of limitations had run, would this help petitioner Lapensohn, who was out of the jurisdiction for fourteen months? First of all, there was no proof that even though Lapensohn was out of the jurisdiction, he was not available for service of process. This proof is required in Pennsylvania; see *Commonwealth v. Turner*, 176 Pa. Super. 32, 107 A. 2d 136 (1954); *cf. Commonwealth v. Dunnick*, 32 Pa. D. & C. 2d 257 (Q. S. York Cty. 1963). However, even if the statute of limitations had tolled for fourteen months against Lapensohn, if the statute of limitations ran against other defendants, appellants could not be tried on the crime charged, since he could not be found guilty of conspiring with himself. See, REIMEL, CRIMINAL LAW (1958), page 64, esp. cases cited at fn. 25.

For the state courts to permit a conviction to stand where the statute of limitations had run on the crime charged would be to deprive these defendants of the protection of the laws accorded to all other defendants in the Commonwealth, without any reasonable distinction. Since the Supreme Court of Pennsylvania has not seen fit to resolve this issue, only this Court can determine whether the Constitutional rights of this petitioner and his co-defendants have been abrogated and can prevent the denial of equal protection of the laws.

5. Petitioner Was Prevented From Obtaining Selection of a Fair Jury.

The appellate courts of Pennsylvania have concluded that there is no constitutional right to any peremptory challenges. *Commonwealth v. Giambrone*, 183 Pa. Super. 283, 130 A. 2d 255, 261 (1957); *Commonwealth v. Antico*, 146 Pa. Super. 293, 22 A. 2d 204 (1941); *cf. Commonwealth v. Bubna*, 357 Pa. 51, 53 A. 2d 104 (1947). However, the legislature has provided for six peremptory challenges for

the defendant and six for the Commonwealth in trials for misdemeanors. Act of March 6, 1901, P. L. 16, PA. STAT. ANN., tit. 19, § 811. Although this right is legislative in character, neither the legislature nor the court acting under a statute could arbitrarily deprive some defendants of the right while granting it to others.

The legislature has also provided that in cases of joint trials the accused shall have the right to the same number of peremptory challenges to which either would be entitled if separately tried and no more. Act of March 31, 1860, P. L. 427, PA. STAT. ANN. tit. 19, § 785. The trial court interpreted this to entitle the six defendants to a total of six challenges. The defendants requested some additional challenges, but were limited to a total of six for all.

The Pennsylvania courts have held the allowance of more than required by statute could not be considered prejudicial so as to require a new trial. *Commonwealth v. Giambrone, supra.* Here it is respectfully submitted that the refusal of the court to grant *any* additional challenges was not only an abuse of its discretion but also deprived these appellants of equal protection of the law by preventing them from effectively exercising the right to peremptory challenges granted to defendants in other trials. As happened here, counsel for the various defendants, representing adverse interests, could not effectively agree upon the exercise of their right to challenge. Thus, it was possible for one counsel to utilize more than his proportionate share of the challenges, thereby depriving counsel for some of the other defendants from exercising *any* challenges. It is not contended that each defendant should have been entitled to six challenges, but, as in the *Giambrone* case, *supra*, the trial court should have granted *some* extra challenges. Failure to do so effectively deprived the defendants of their right to guarantee selection of a fair jury.

In addition, the court seriously limited the scope of voir dire of prospective jurors. For example, attempts by counsel to determine whether prospective jurors had formed

any opinion about the case, or about the guilt of the defendants, were blocked, with the judge ruling that the respective jurors could be asked only whether they had formed a *fixed* opinion. Even if it would not have been grounds for a challenge for cause that the juror had formed an opinion which was not a fixed opinion, still the question was proper to enable counsel to determine whether or not to exercise a peremptory challenge.

Because of this severe limitation on voir dire, coupled with the limited number of peremptory challenges, defendants were unable to guarantee a selection of a fair jury. The selection of the jury under this procedure was like playing poker blindfolded. Petitioner was accordingly denied his constitutional right to selection of a fair jury.

6. There Was No Evidence Supporting a Finding That Petitioner Committed the Crime Charged.

Since the classic cases in this Court of *Garner v. Louisiana*, 368 U. S. 157, 7 L. ed. 2nd 207 (1961); *Thompson v. Louisville*, 362 U. S. 199, 206, 4 L. ed. 2nd 654, 659 (1960); *cf. Cole v. Arkansas*, 333 U. S. 196, 201, 92 L. ed. 644, 647 (1948), it is clear that this Court will review the record to determine whether the conviction is so totally devoid of evidentiary support as to render it unconstitutional under the due process clause of the Thirteenth Amendment.

It is respectfully submitted that, despite testimony taking more than ten weeks to present and the introduction of almost 1,100 exhibits, the record is completely devoid of any evidence supporting a finding that petitioner was in any manner connected with a conspiracy to cheat and defraud the Union or its members of their moneys, goods, chattels, and other property.

It is respectfully submitted that all of the testimony fails to prove the existence of any conspiracy between or among any of the defendants. In fact, no evidence was ever offered on two essential elements of the crime

charged—namely, there is absolutely no proof that any of the expenditures or conduct charged to the defendants were not authorized by the full membership of the Union, in complete conformity with its by-laws and constitution; nor was there any iota of evidence offered to show that any of the defendants knew that there was no such authorization. Furthermore, there was not one shred of evidence that any diversion of funds was part of any conspiracy, much less the specific conspiracy charged. Finally, there was not one word of proof—much less proof beyond a reasonable doubt—that any of the defendants personally participated in any unlawful diversion of funds or benefited thereby. There was no proof that any one of them forged checks, personally altered any vouchers, nor is there any credible evidence that any one of them personally received any funds intended for anyone else or for any other purpose. In short, each of the twenty incidents set out in the statement of facts, *supra*, was itself innocent, or at least not probative of the offense charged.

But more important, as to petitioner Lapensohn specifically, there was not one scintilla of evidence connecting him with any conduct embraced by the crime charged in the indictment. *The first four incidents, relating to the alleged seizure of control of the Union and reimbursement of expenses, all occurred before petitioner Lapensohn was employed by the Union.* There was no evidence offered to show that he in any way participated in any of the incidents, or joined in any common plan. Absolutely the only evidence offered by the Commonwealth to support his connection was the alleged innocuous statement by petitioner Lapensohn to Louis Stein, an officer of Food Fair, that Lapensohn had been the sponsor of Cohen during the election (R. 2194a). There was no evidence that this statement, made long after the event and apparently in an attempt to impress someone, had any foundation in fact or was more than a self-serving statement at that time. Even if taken at face value, to support a man's election is mani-

fectly not equivalent to conspiring with that person to commit an illegal act, even if the elected person were to commit an illegal act after taking office. There was not one shred of evidence that Cohen had any improper motives at the time he sought election, nor is there a hint that even if he had, Lapensohn knew of such motives and approved of them and supported him for such purpose.

Of the next ten incidents, relating to alleged diversion of Union funds, *several took place after petitioner Lapensohn's connection with the Union terminated.* These included the international convention in Miami, the clothing purchases, and the Gallagher strike payments. As to the Horn & Hardart strike payments, there was not the slightest suggestion that Lapensohn had any connection with the incidents. In fact, the evidence was ruled by the judge as immaterial with relation to him. There was no evidence offered to show any diversion of funds intended for insurance payments. In fact, the evidence showed that all such payments were made. There was no evidence offered as to whether or not the items covered by such insurance were proper under Union by-laws and constitution; even if they were not proper, there was no evidence offered to show that Lapensohn, the insurance broker on the policies, knew they were unauthorized. Additionally, there was no evidence showing this was part of a conspiracy.

The circumstantial evidence relating to the alleged diversion of checks drawn to Katz, Kanner, Kirsch and Marshall & Co., was not sufficient to show Lapensohn's participation in the conspiracy charge. The mere fact that he cashed checks of similar denominations on the days that these checks were cashed does not prove that the funds were diverted to him, that they were unauthorized, nor that it was part of any conspiracy as charged. To permit a conviction to stand on such flimsy circumstantial evidence would amount to conjecture.

The payment to Mastrin clearly did not belong in this case. Mastrin testified that the money he gave to

Lapensohn was his own. It was paid to him for services rendered to the Union. There was no suggestion by the Commonwealth that the services were not rendered or that the services were not worth the amount charged. What he did thereafter with his money has nothing to do with a conspiracy to cheat the Union or its members. Even if this evidence were interpreted to constitute a "kick-back," as the Commonwealth seems to suggest, this does not constitute the crime charged in the indictment. In fact, to permit this testimony was palpable error, since it could only constitute proof of a crime not charged in the indictment.

The next five incidents, showing financial transactions between the defendants, cannot by any stretch of the imagination, constitute proof of the conspiracy charge. The fact that petitioner Lapensohn received pay checks, or even some other payments which may be unexplained or unsupported by vouchers, does not prove his complicity in a conspiracy to cheat and defraud the Union. Even if he had financial transactions with other defendants, there is nothing illegal about that. Setting aside the completely arbitrary manner in which defendant Cohen's allegedly unexplained resources were proved—based on an arbitrary period of time, charts not substantiated by evidence, and conclusions of alleged experts founded upon information not in evidence—this does not in any manner tend to prove the specific crime charged. The Commonwealth's conjecture that Cohen received the proceeds and diverted funds is no more supported by evidence than the conjecture that Cohen had some other legal or illegal source of funds.

In short, to permit a conviction to stand on such conjecture would guilt by the remotest association with suspicious, but not guilty, incidents.

The final incident relating to trailer drops has not the remotest relationship to any crime at all, much less the crime charged in the indictment. First of all, the evidence shows that *Food Fair did not receive favored treatment,*

but instead had to put on additional men at a considerable cost in order to maintain the position it held prior to the negotiations by defendant Cohen. This benefited the Union rather than harmed it. Even if the negotiations had resulted in harm to the Union, there is not the slightest evidence offered to show that this was part of a conspiracy. The mere fact that months later Lapensohn and Cohen, along with hundreds of other people, some connected with labor and many other walks of life, were offered favorable financial treatment in connection with stock interests of Food Fair, does not remotely tend to prove complicity in the crime charged. Even the Superior Court of Pennsylvania, in affirming the convictions, did not demonstrate how each of these incidents tended to prove the specific charge contained in the indictment. The Superior Court merely sets forth the summary of the evidence, in many instances misinterpreting the facts or drawing inferences not justified by the facts, and simply concludes that the evidence was sufficient to sustain the convictions. There was absolutely no statement in the opinion supporting its conclusion that the defendants entered into a continuing conspiracy, that in the execution of their scheme they planned and did gain control of the Union and its treasury, that they extended their domination by replacing key officials and proceeded to loot the Union treasury by various devices (Appendix C, page 8a). Even in Pennsylvania to sustain a conviction of conspiracy there must be proof of a combination of two or more persons with criminal intent or corrupt motives to do a crime or an unlawful act, or an act by criminal or unlawful means. *Commonwealth v. Horvath*, 187 Pa. Super. 206, 144a 2nd 489, 491 (1958); *Commonwealth v. Gaines*, 167 Pa. Super. 485, 75a 2nd 617 (1950); *Comonwealth v. Ricci*, 177 Pa. Super. 566, 112a 2nd 656 (1955). The evidence in the case at bar may have taken longer to present than it did against "Shuffling Sam" (*Thompson v. Louisville, supra*), but it was no more substantial.

CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the petition of the other defendants in this case, which are adopted herein where applicable, in order to protect the constitutional rights of petitioner and his co-defendants, and to decide questions of grave import to the administration of justice in the states, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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